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No. 1005

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

ZAYRE OF GEORGIA, INC., ET AL
Petitioners

v.

THE CITY OF MARIETTA, ET AL
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

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The petitioners, Zayre of Georgia, Inc., and S. S. Kresge Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on July 30, 1969, and the judgment entered on September 25, 1969, by the said Court denying petitioners' application for rehearing and for rehearing before the Judges En Banc.

OPINIONS BELOW

The opinion of the District Court denying petitioners' motion to enlarge and broaden the preliminary injunction previously granted, not reported, is fully set forth in Appendix A attached hereto.

The opinions of the Court of Appeals for the Fifth Circuit, and its refusal of petitioners' motion for rehearing, and rehearing En Banc, as yet unreported, are fully set forth in Appendix B attached hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit in affirmance of the lower court was entered July 30, 1969 (Appendix B infra.) A petition for rehearing, and rehearing En Banc, timely filed, was denied by order dated September 25, 1969 (Appendix B, infra.)

The jurisdiction of this Court is involved under 28 U.S.C., section 1254(1).

QUESTIONS PRESENTED

The primary issue for determination is whether the court below failed to properly apply the constitutional standard demanded in the Fourteenth Amendment of the Constitution of the United States, as enunciated in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part under Section 1 thereof, as follows:

> ". . . . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Georgia statute under consideration appears in Georgia Code Ann. 26-6905 (now repealed but reenacted as Georgia Code Ann. 26-9908) as follows:

> "26-6905. (416 P. C.) Violating the Sabbath Day. — Any person who shall pursue his business or the work of his ordinary calling on the Lord's day, works of necessity or charity only excepted, shall be guilty of a misdemeanor. (Cobb, 853. Acts 1865-6, p. 233.)"

STATEMENT OF THE CASE

This file originated upon the filing of a complaint by the petitioners, engaged in the retail department store business, praying for an injunction against the cities of Marietta and Smyrna, in Cobb County, Georgia, and the Solicitor General of that Judicial Circuit, prohibiting the discriminatory enforcement of the Georgia Sunday Closing Law as enacted in the Georgia Code Ann. 26-6905, as above set forth. The basis for federal jurisdiction to entertain said complaint is found in Section 2 of Art. III of the Constitution of the United States providing in pertinent part that:

> "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution. . . . .".

The complaint charged that plaintiffs were threatened with immediate prosecution and revocation of their business licenses for remaining open to do business in violation of the said Georgia Sunday law, while other businesses, selling all or some of the items which complainants offered for sale in direct competition thereof, were allowed to pursue and conduct business on Sunday without similar demands for compliance of the Georgia Sunday Law, thereby causing complainants to suffer discriminatory and unequal enforcement of the Georgia laws in contravention of the equal protection guaranteed under the Fourteenth Amendment of the Constitution of the United States.

The District Court thereupon issued a temporary restraining order (Appendix C infra,) which merely pro-

hibited the defendants from discriminatory enforcement of the said Georgia Sunday Law, while expressly reserving to the defendants the right to enforce the said Sunday law and to revoke business licenses by reason of violation thereof.

This temporary restraining order was thereafter continued in substantially the same terms by a preliminary injunction entered by the District Court (Appendix D infra).

Promptly thereafter in a motion by complainants, the District Court was urged to enlarge and broaden the preliminary injunction so granted to include the prohibition of enforcement of the said Sunday Law against complainants while, at the same time failing, refusing and neglecting to enforce said law against other noncompetitive businesses, specifically naming same, which were in fact operating their businesses on Sundays.

This motion the District Court denied in the order entered as appears in Appendix E infra, which became the subject of appeal to the Court of Appeals, and now the subject of this petition by reason of the said Court's affirmance.

REASONS FOR GRANTING THE WRIT

The decisions of the Court of Appeals below should be reviewed because it erroneously interprets the doctrine laid down in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) and unreasonably restricts its application to only those cases where discriminatory enforcement appears between directly competing businesses, notwithstanding the studied emphasis placed by the courts on the constitutional cover of protection given by the Fourteenth Amendment, and the clear mandate of the Court in *Yick Wo* relative thereto.

The narrow view by the majority of the Fifth Circuit Panel overlooks not only the wording of this statute as interpreted by both the Georgia Supreme Court and the United States Supreme Court, but overlooks the inherent right of all to compete for an overall share of the gross national economy without arbitrary and discriminatory distinction.

First, as to the broadness of the statute, the Georgia State Supreme Court, in the case of *Henning v. The State*, 90 Ga. 396, defined the all-encompassing policy prohibiting Sunday work as follows:

> "Nor is the statute a regulation of commerce. It applies alike to all business, vocations and occupations. It concerns the general police of the State and of all interests, whether agricultural, mechanical, manufacturing, commercial, professional, or what not. It is universal, and rigidly impartial, making no discrimination whatever for or against commerce or anything else. It puts no obstacle in the way of trade or its operation which is not encountered by every other class of worldly business or employment. Non-trading days are non-business days generally, and non-working days for all the people. Trade may go on when anything else can; it stops only when, and so long as, there is a complete suspension of worldly enterprise and activity. It is required to take no rest which is not appointed for everything else to take."

This decision was reviewed by the United States Supreme Court in the case of *Hennington v. Georgia*, 163, U.S. 299, and was affirmed and approved.

This broadness is recognized in the dissenting opinion of Judge Boyle in this case, wherein he stated:

> "Thus, those 'similarly situated' in this case are all persons pursuing their regular business or calling, other than in the spheres of charity or necessity. The statute applies to "any person"

> and, therefore, those "similarly situated," for purposes of this statute, are "all persons" and are those entitled to be treated alike. The fact that a retail merchant is more "similarly situated" with other retail merchants, for example, than he is with a florist or pet shop operator, does not compel the conclusion that the retail merchant and the florist and the pet shop operator are not "similarly situated" so far as this statute is concerned. To hold otherwise is to read *Yick Wo vs. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) too narrowly."

Since the statute by its terms applies to all following their regular calling on the sabbath, it should be applied equally to all or to none irrespective of direct economic competition. "And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *Reynolds vs. Sims*, 377 U.S. 533.

In *Barbier v. Connolly*, 113 U.S., 31, this Court stated:

> "The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one

except as applied to the same pursuits by others under like circumstances."

Petitioners feel that no more flagrant violation of the doctrines above set out could be demonstrated than is demonstrated in the instant case.

CONCLUSION

It is clear that the court below fell into the very grievous error not only detrimental to petitioners but detrimental to the administration of justice as a whole, whereby the Court applied virtually the text of economic advantage to petitioners in a determination of whether the Georgia Statute, Georgia Code Ann. 26-6905, above quoted, was being enforced non-discriminatorily by the defendants in accordance with its provisions, which excepts no businesses other than "works of necessity or charity", contrary to the equal protection guarantees of the Fourteenth Amendment of the Constitution of the United States. It is respectfully submitted that for the above compelling reasons, the writ of certiorari should be granted.

Respectfully submitted,

Hosea Alexander Stephens, Jr.

Hoke Smith
Attorneys for Petitioners

AFFIDAVIT

I, HOKE SMITH, of counsel for the Petitioners, do certify that I have this date served a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, upon Berl Tate, Esq., Arthur Crowe, Jr., Esq., George W. Darden, Esq., and Lawrence B. Custer, Esq., by mailing a copy of same to each of them in properly addressed envelopes with adequate postage thereon.

This day of November, 1969.

Hoke Smith

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 26161

ZAYRE OF GEORGIA, INC., *et al*,

Appellants,

versus

THE CITY OF MARIETTA, *et al*,

Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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July 30, 1969

Before BELL and COLEMAN, Circuit Judges and Boyle, District Judge.

BELL, Circuit Judge: This is an appeal from the denial of a motion to broaden a preliminary injunction issued by the United States District Court for the Northern District of Georgia.[1] We affirm,

Appellants, Zayre of Georgia, Inc. and S. S. Kresge Company, both retail department stores,[2] initiated this

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[1]On appealability, see *Dilworth v. Riner*, 5 Cir. 1965, 343 F.2d 226.

[2]Subsequently, Gibson's Discount Centers, Inc. moved for and was granted leave to intervene as a plaintiff.

litigation seeking an injunction against the cities of Marietta and Smyrna, Georgia and the Solicitor General of the Cobb Judicial Circuit prohibiting the discriminatory enforcement of the Georgia Sunday closing law, Ga. Code Ann. § 26-6905,[3] and the revocation of business licenses on the grounds of alleged violations of the closing law. Appellants alleged that while they were being threatened with prosecution and revocation of their business licenses for remaining open in violation of the statute, other business establishments selling all or some of the items which appellants offered for sale in direct competition with appellants were being allowed to conduct business on Sunday without threat of prosecution or revocation of licenses. It was appellants' contention that such unequal enforcement denied them equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

On the same day the complaint was filed the District Court issued a temporary restraining order, the pertinent part of which reads as follows:

> "In the meantime and until further order of this Court the defendants and all persons acting in concert with them, are temporarily restrained from enforcing Section 26-6905 of the Code of Georgia of 1933 in a discriminatory manner and from revoking business licenses by

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[3]Ga. Code Ann. § 26-6905 reads as follows:

> "Any persons who shall pursue his business or the work of his calling on the Lord's day, works of necessity or charity alone excepted, shall be guilty of a misdemeanor."

> reason of the violation of said Code Section in a discriminatory manner. This restraining order is not intended to prohibit the enforcement of Section 26-6905 of the Code of Georgia of 1933 . . . nor to prohibit the revocation of business licenses by reason of its violation, but rather it orders that such enforcement be on a nondiscriminatory basis . . . ."

Thereafter, the court entered a preliminary injunction in substantially the same terms as the temporary restraining order previously entered. Appellants moved for further relief. Their idea was that the relief originally sought was not broad enough in that others not in competition with them were being allowed to operate their regular businesses or engage in their regular occupations on Sundays without threat of sanction, while appellants were required to do so at their risk. Accordingly, appellants moved the district court to enlarge and broaden the preliminary injunction already in effect so as to enjoin this alleged form of discrimination. They cited several examples of non-competitive businesses or occupations as to which the statute was not being enforced. Some of these included aircraft manufacturing, real estate, florist, the delivery of newspapers, theaters, funeral directors, and radio stations. The district court denied the motion to enlarge and set out the principal reason for said denial as follows:

> "This case originally came before this court on the basis of discriminatory enforcement of the statute as between persons similarly situated within Cobb County. This is what was enjoined and all that was enjoined. It is still en-

> joined. But by their motion to enlarge the plaintiffs do not complain of discriminatory enforcement against them. What they do complain of is non-enforcement against other professions and trades in which plaintiffs are apparently not engaged. There is, of course, a great difference between discriminatory enforcement of a statute and non-discriminatory non-enforcement. So far as appears from their motion, for example, the plaintiffs themselves, if they care to do so, may operate a funeral parlor, a radio station, a pet shop, a florist shop or a business in any of the other categories complained of on the same basis as all other persons.
>
> "Such being the situation, it is difficult to see how the plaintiffs have standing to assert the charges contained in their motion."

There is no contention that the Sunday closing law is unconstitutional. Cf. *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961), and *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 81 S.Ct. 1135, 6 L. Ed.2d 551 (1961). The sole issue presented is whether appellants have standing to assert a denial of equal protection under the facts of the case. We agree with the district court that they do not.

Appellants' predicate is the Fourteenth Amendment prohibition against unequal enforcement of statutes or ordinances announced in *Yick Wo v. Hopkins* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886):

> ". . . Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

The resolution of the issue in the case before us depends upon the extent to which the principle of *Yick Wo* is applicable to the facts of this case. *Yick Wo* involved discrimination based on race between two classes in direct economic competition with one another. Here, after the granting of the preliminary injunction, there could no longer be any inequality of treatment among those in direct economic competition nor is any claimed. Consequently, there is no basis for applying the teaching of *Yick Wo* in the instant case wherein those allegedly receiving preferential treatment are not in similarly circumstances to appellants.

In a recent case we found no substantial federal question in a context of alleged disparate treatement of school children not similarly situated. *Davis v. Georgia State Board of Education*, 5 Cir., 1969, 408 F.2d 1014. We stated:

> "Basic to any complaint of denial of equal protection must be some showing that the persons or groups being treated differently are similarly situated and that their disparate treat-

> ment by the state is either without any rational basis or is based on some invidious factor such as race. . . . ." 408 F.2d at 1015.

If appellants are contending, as the district court discerned the situation, that they should be immunized from prosecution under the statute unless and until other violators are brought to justice, then their attack also must fail under the circumstances here. A similar argument was rejected by the Supreme Court in *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). See also *Moss v. Hornig*, 2 Cir., 1963, 314 F.2d 89; and *United States v. Rickenbacker* 2 Cir., 1962, 309 F.2d 462.

In sum, appellants failed to allege a cause of action under the equal protection clause. The federal courts have no general supervisory power over the operation of state and local governments. The federal courts can, of course, afford relief where the equal protection of the law is denied by a state or a local government but such a denial subsumes discrimination. A showing of discrimination rests, in turn, on a difference in treatment as between those similarly situated. The similarity element is missing here.

AFFIRMED.

BOYLE, District Judge, dissents.

I respectfully dissent and would, therefore, reverse and remand the case to the District Court with directions to enjoin any discrimination whatsoever in the enforcement of the statute amongst all those pursuing the same

or different business or occupations not within the statutory exceptions.

The courts of Georgia are the proper courts to pass upon the meaning of a Georgia statute (including any exceptions thereto) and, assuming that the Georgia courts have reasonably interpreted a constitutional statute — and there is no contention to the contrary in this case — no obstacle exists to the fair enforcement of such a statute. It is then up to the authorities charged with the enforcement of State laws to enforce them fairly, as interpreted, until their repeal.

While it is generally true that one is not entitled to complain of non-enforcement as to others when a given statute is sought to be enforced against him, it is also true that invidious, purposeful selectivity or discrimination in the enforcement of a statute cannot be squared with the Fourteenth Amendment's mandate of Equal Protection of the Law.

An examination of the statute herein involved reveals that by its terms it applies to "any person who shall pursue his business or the work of his ordinary calling." But for its exemption of "works of necessity or charity," it admits of no classifications whatever. Consequently, the statute provides no basis for any differential enforcement outside the area of works of necessity or charity. Accordingly, no support can be found in the statute for enforcement thereof as to one type of business or occupation and non-enforcement as to other covered businesses or occupations. In my view, enforcement in such a manner contravenes the rights of those against whom it is so

enforced to equal protection under the law as guaranteed by the Fourteenth Amendment and should be enjoined.

While prosecuting authorities have the right, and, indeed, in many instances the duty, to exercise some judgment and discretion in the enforcement of statutes, it is not their prerogative to carve out exceptions to statutes of universal or general application,[1] particularly, when such exceptions have been previously explicitly rejected by the courts of the state enacting the statute.

The contention was advanced by appellants in support of their motion to enlarge the injunction already issued by the district court that certain businesses and occupations, which the courts of Georgia have held to be subject to the Sunday work prohibition and without the ambit of the statutory exceptions, are being permitted to be conducted on Sunday with impunity while the statute is still being enforced as to petitioners, retail merchants. If this be the case, and the record as presently before us indicates that it is, petitioners are entitled to injunctive relief.

The right to engage in one's regular business or occupation is fundamental to our political heritage and our

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[1]In *Zayre of Georgia, Inc.* v. *City of Atlanta*, 276 F. Supp. 892 (N.D. Ga. 1967) Judge Lewis R. Morgan, now of this Court wrote:

> "*McGowan* and *Two Guys* make it clear that a state can consitutionally effect and maintain Sunday closing laws. These cases also make it clear that the state can choose to create *reasonable* exceptions, either by legislation or judicial action; however, this Court is of the opinion that neither case stands for the proposition that municipalities may choose to carve out exceptions via selective enforcement of the state statute."

economic philosophy of free enterprise. Any regulation of that right should be not only reasonable on its face in light of the governmental purpose of such regulation, but should be applied with scrupulous equality. It, therefore, appears less than just to close the courthouse doors to appellants on the ground that they have no standing to seek relief from unequal treatment since those in the same business or occupation are subject to the same unequal treatment. To so hold, it seems, reveals a basic misconception of the phrase "similarly situated."

Without the excepted classifications, all persons, all businesses, all occupations and all activities are similarly situated in the contemplation of the statute.[2]

Thus, those "similarly situated" in this case are all persons pursuing their regular business or calling, other than in the spheres of charity or necessity. The statute

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[2]The Supreme Court of Georgia in *Hennington* v. *State*, 90 Ga. 396, 17 S.E. 1009 (1892), aff'd sub nom. *Hennington v. State of Georgia*, 163 U.S. 299, 16 S. Ct. 1086, 41 L.Ed. 166 (1896) made the following comments concerning the statute.

> "It applies alike to all business, vocations, and occupations. It concerns the general police of the state and all interests, whether agricultural, mechanical, manufacturing, commercial, professional, or what not. It is universal, and rigidly impartial, making no discrimination whatever for or against commerce or anything else. It puts no obstacle in the way of trade or its operations which is not encountered by every other class of worldly business or employment. Nontrading days are nonbusiness days, generally, and nonworking days for all the people. Trade may go when anything else can. It stops only when, and so long as, there is a complete suspension of worldly enterprise and activity. It is required to take no rest which is not appointed for everything else to take."

applies to "any person" and, therefore, those "similarly situated," for purposes of this statute, are "all persons" and are those entitled to be treated alike. The fact that a retail merchants is more "similarly situated" with other retail merchants, for example, than he is with a florist or pet shop operator, does not compel the conclusion that the retail merchant and the florist and the pet shop operator are not "similarly situated" so far as this statute is concerned. To hold otherwise is to read *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) too narrowly.

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UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 26161

ZAYRE OF GEORGIA, INC., *et al*,

Appellants,

versus

THE CITY OF MARIETTA, *et al*,

Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(September 25, 1969)

Before BELL and COLEMAN, Circuit Judges and BOYLE, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Boyle, District Judge, dissents.

ORDER

The within and foregoing petition read, considered and ordered filed.

Let a copy thereof, together with copy of this order, be served upon each of the named defendants and let the defendants show cause before me at 11:30 A M o'clock on the 8th day of March, 1967, in Atlanta, Georgia, why the prayers of the petition should not be granted.

In the meantime and until further order of this Court the defendants and all persons acting in concert with them, are temporarily restrained from enforcing Section 26-6905 of the Code of Georgia of 1933 in a discriminatory manner and from revoking business licenses by reason of the violation of said Code Section in a discriminatory manner. This restraining order is not intended to prohibit the enforcement of Section 26-6905 of the Code of Georgia of 1933, nor to prohibit the enforcement of Section 26-6905 of the Code of Georgia of 1933, nor to prohibit the revocation of business licenses by reason of its violation, but rather it orders that such enforcement be on a nondiscriminatory basis. This restraining order is not intended to interfere with the policy of any of the defendants regarding the enforcement of Section 26-6905; however, it is intended to prohibit its enforcement in any other than a fair and nondiscriminatory manner.

ORDER ON MOTION FOR PRELIMINARY INJUNCTION

(Number and title omitted) (Filed December 5, 1967)

The instant action was brought to seek an injunction requiring the City of Marietta, the City of Smyrna, and their officials, and the Solicitor General of the Cobb Judicial Circuit to apply Georgia Code Section 26-6905 in a non-discriminatory manner and requiring the above-

named municipalities from exercising their power of license revocation in a discriminatory manner.

Gibson's Discount Centers, Inc., a Corporation, filed its Motion to Intervene and its Intervenor's Complaint and there being no objection to the same, the intervention is allowed and Gibson's Discount Centers, Inc., hereby becomes a party plaintiff.

As noted previously, the Courts of Georgia have carved out numerous exceptions to 26-6905; the sale of gasoline and drugs are among these judicially-created exemptions. It is a matter of common knowledge that outlets for the above commodities do not restrict themselves to the sale of drugs or gasoline. In simple terms, many "drug stores" which operate 24 hours a day, 7 days a week, carry items ranging from radios to electric knives and from lingerie to lawn furniture. Not only is the sale of such articles clear from the evidence, it is apparent that such goods are sold in direct competition with the same merchandise carried by the petitioners. It is blatantly obvious that the merchandise carried for resale does not determine whether a business falls within the scope of 26-6905; the key appears to be whether the establishment calls itself a "drug" store or a "department" store. Such a distinction is tenuous at best.

The evidence discloses that drug stores carrying consumer goods from A to Z are allowed to stay open on Sundays and to sell all their wares, not just drugs; that drive-in groceries which carry almost every article of food which the consumer may have forgotten to purchase during the other six days of the week remain open on Sunday.

McGowan v. Maryland, 366 U.S. 420 (1961) and *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 599 (1961) make it clear that a state can constitu-

tionally effect and maintain Sunday closing laws. These cases also make it clear that the state can choose to create *reasonable* exceptions, either by legislation or judicial action; however, this Court is of the opinion that neither case stands for the proposition that neither municipalities nor prosecutors may choose to carve out exceptions via selective enforcement of the state statute.

Thus, the Court is of the opinion that, under the doctrine of *Yick Wo. v. Hopkins*, 118 U.S. 56 (1886), and in view of the uncontradicted facts, it has no alternative but to issue an injunction ordering the defendant to enforce 26-6905 in a non-discriminatory manner. It must be noted that this injunction does not prohibit the enforcement of a criminal statute; but rather it orders that such enforcement be on a non-discriminatory basis. Also, the Court has no desire to interfere with the policy of the defendants regarding the enforcement of 26-6905; however, the Court must insist that enforcement policy of the defendants must be applied in a fair and non-discriminatory manner.

The same reasoning applies to the admitted threats of both Municipality Defendants with respect to the exercise of their power to license revocation. Again, the Court does not desire to interfere in such matters. It is indeed unpleasant and burdensome to the Court to be required to do so. However, under its sworn duty, the Court has no alternative but to order that this power of revocation be exercised only in a fair and non-discriminatory manner.

Thus, this Court hereby issues a preliminary injunction prohibiting the discriminatory enforcement of Section 26-6905 of the Code of Georgia, and the discriminatory exercise of the power of license revocation.

IT IS SO ORDERED.

This the 28th day of November, 1967.

NEWELL EDENFIELD
Newell Edenfield
United States District Judge

ORDER 6TH DAY OF MARCH

(Number and title omitted) (Filed March 6, 1968)

On the 28th day of November, 1967, pursuant to a complaint filed by two discount merchants operating in Cobb County, this court issued a preliminary injunction prohibiting discriminatory enforcement of the Sunday closing laws by the officials of the defendant Cobb County and certain municipalities within that county, the plaintiffs' complaint being that the local authorities were enforcing the Sunday closing laws by criminal prosecution filed against them but declined, failed and refused to enforce such laws against local drugstores and merchants in substantially the same lines of business. As authority for such injunction, see *Yick Wo v. Hopkins*, 118 U.S. 56, and *Sayre v. City of Atlanta*, Civil Action No. 10106 in this court, decided on the 22nd day of February, 1967. Thereafter, a contempt citation issued on December 4, 1967 charging violation of this injunction. Hearings were held on this citation at which it appeared that some of the defendants, after the order in question, had again singled out plaintiffs for prosecution, while others were not so prosecuted, but had stopped at the brink of actual contempt, since the accusations had issued but were in fact never filed. At a hearing on December 7, 1967, the defendants were discharged from the contempt citation with warnings as to future conduct.

At this point, defendant (Solicitor General) Ben F. Smith, the prosecutor and chief law enforcement officer

of Cobb County, issued and either served or caused to be publicized a general notice to all retail merchants and outlets and to the general public in Cobb County, in which, in substance, he called attention to the previous injunction, stated his intention to comply with the injunction in every particular, and announced his interpretation of what could be sold on Sunday (as works of necessity or charity which were exempted from the Sunday closing laws) and items which could not be sold.

Thereafter, plaintiffs appeared before the court (which was then engaged in the trial of other cases) and challenged the interpretation of the closing laws as published by the Solicitor and sought further relief by contempt, their complaint being, in substance, not discriminatory prosecutions against them, but that other persons, professions and businesses, not mentioned in said notice, were permitted to, and did, pursue their common calling or vocation on the Sabbath in violation of the statute. The court orally denied this motion on the ground that the injunction previously granted related only to "discriminatory enforcement" as between competing merchants and did not enjoin or require enforcement of another part of the statute preventing persons from following their ordinary vocation on Sunday. In the suit as originally filed, no such relief was sought or granted. Thereafter, on December 8, 1967, plaintiffs filed a motion to amend the preliminary injunction previously granted, pointing out, pursuant to such new theory, that numerous persons in Cobb County, such as radio stations, newspapers, real estate agents, antique merchants, theaters, pet shops, florists, funeral directors, television repair personnel, and ministers, were still being allowed to follow their regular occupations on Sunday, their prayer being that the preliminary injunction previously entered be broadened to enjoin all such activities. In connection with this motion to enlarge, interrogatories of the plain-

tiffs to each of the defendants have been filed and answered, and the motion is now before the court.

This case originally came before this court on the basis of discriminatory enforcement of the statute as between persons similarly situated within Cobb County. This is what was enjoined and all that was enjoined. It is still enjoined. But by their motion to enlarge, the plaintiffs do not complain of discriminatory enforcement against them. What they do complain of is non-enforcement against other professions and trades in which plaintiffs apparently are not engaged. There is, of course, a great difference between discriminatory enforcement of a statute and non-discriminatory non-enforcement. So far as appears from their motion, for example, the plaintiffs themselves, if they care to do so, may operate a funeral parlor, a radio station, a pet shop, a florist shop or a business in any of the other categories complained of on the same basis as all other persons.

Such being the situation, it is difficult to see how the plaintiffs have standing to assert the charges contained in their motion. As the Supreme Court of Georgia has said:

> "It is a settled rule of law that one cannot raise the question of constitutionality of a statute, or of the action of an administrative agency acting under statutory power, as violative of constitutional rights, unless the interest or rights of such complaining party are affected by the statute or the action of the agency. *Cooper v. Rollins*, 152 Ga. 588 (110 S. E. 726, 20 A.L.R. 1105); *Steqall v. Southwest Georgia Regional Housing Authority*, 197 Ga. 571 (30 S.E. 2d 196); *Whittle v. Jones* 198 Ga. 538 (4) (32 S.E. 2d 94); *Civil Service Board of Fulton County v. MacNeill*, 201 Ga. 643 (2) (40 S.E. 2d 655); *Franklin v. Harper*, 205 Ga. 779 (55 S.E. 2d 221)." *West v. Housing Authority of City of Atlanta*, 211 Ga. 133, 136.

See also *Doremus v. Board of Education*, 342 U.S. 429, 96 L. Ed. 475, 72 S.Ct. 394, cited in Wright on *Federal Courts*, p. 36, § 13.

Irrespective of all other considerations, the court, in its discretion, would be inclined to deny the motion on this ground alone.

But there are other considerations. For example, while the plaintiffs in their motion refer to "discrimination" against them, what they really want is a mandatory injunction to compel the State to enforce all of its criminal laws against everybody and not just some of them against everybody. Manifestly, this court cannot take over prosecutions in state courts so as to compel them to prosecute anyone, at least in the absence of some showing of discrimination between persons similarly situated. If the State chooses, in non-discriminatory fashion and while treating all persons alike, to refrain from enforcing a general prohibition against following a regular calling on Sunday while at the same time choosing to enforce other parts of the statute, no relief can be had in this court.

It is true that the interpretation of the state statute by the Solicitor General as to what may or may not be works of charity or necessity may be wrong; but that is a State matter, and as long as his interpretation is indiscriminately enforced against everyone alike, no federal question is presented under the Equal Protection Clause of the Fourteenth Amendment. That discrimination is a sina qua non of an equal protection complaint is too obvious to require authority.

The motion to enlarge the injunction is denied.

This 6 day of March, 1968.

NEWELL EDENFIELD
NEWELL EDENFIELD
United States District Judge